

United States  
Circuit Court of Appeals

For the Ninth Circuit. 9

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BETTY ROGERS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

BETTY ROGERS, O. N. BEASLEY, OSCAR  
LAWLER, JAMES K. BLAKE, Executors of  
the Estate of WILL ROGERS, Deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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Transcript of the Record

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Upon Petitions to Review Decisions of the United  
States Board of Tax Appeals



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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ETTY ROGERS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

ETTY ROGERS, O. N. BEASLEY, OSCAR  
LAWLER, JAMES K. BLAKE, Executors of  
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States Board of Tax Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:

CLAUDE I. PARKER, Esq.,  
JOHN B. MILLIKEN, Esq.,  
BAGLEY KOHLMEIER, Esq.,  
L. A. LUCE, Esq.,

For Respondent:

D. M. EVANS, Esq.

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Docket No. 84895

BETTY ROGERS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DOCKET ENTRIES:

1936

May 29—Petition received and filed. Taxpayer notified. (Fee paid)

May 29—Copy of petition served on General Counsel.

June 30—Answer filed by General Counsel.

July 1—Copy of answer served on taxpayer.

1937

July 20—Hearing set week beginning 9/27/37, Los Angeles, California.

1937

Sept. 27—Hearing had before Mr. Mellott on merits.  
Submitted.

Stipulation of facts filed. Taxpayer's brief  
due 11/11/37—respondent's brief due  
12/11/37—reply due 12/27/37.

Nov. 10—Transcript of hearing 9/27/37 filed.

Nov. 10—Brief filed by taxpayer. 11/11/37 copy  
served.

Dec. 9—Brief filed by General Counsel.

1938

Jan. 10—Motion for leave to file brief filed by tax-  
payer—brief lodged. 1/11/38 granted.

Jan. 12—Copy of motion and reply brief served on  
General Counsel.

May 18—Opinion rendered—Arthur J. Mellott, Di-  
vision 11. Judgment will be entered for  
the respondent.

May 19—Decision entered—Arthur J. Mellott, Di-  
vision 11.

May 20—Order that last paragraph of opinion pro-  
mulgated 5/18/38 be corrected, entered  
Arthur J. Mellott, Division 11.

Aug. 13—Petition for review by U. S. Circuit Court  
of Appeals, Ninth Circuit, with assign-  
ments of error filed by taxpayer.

Aug. 13—Proof of service filed by taxpayer.



1938

- Sept. 24—Certified copy of order from Ninth Circuit consolidating with 84896 for briefing and decision upon a single consolidated transcript of record consisting of such portions of the record before the Board as the parties herein may indicate by their praecipis for record—copy of this order to be incorporated in record—filed.
- Sept. 29—Agreed statement of evidence lodged.
- Sept. 29—Praecipe for record filed with proof of service thereon.
- Sept. 30—Order approving statement of evidence—statement ordered filed—entered. [1\*]

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APPEARANCES:

For Petitioners:

CLAUDE I. PARKER, Esq.,  
JOHN B. MILLIKEN, Esq.,  
BAGLEY KOHLMEIER, Esq.,  
L. A. LUCE, Esq.

For Respondent:

D. M. EVANS, Esq.

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\*Page numbering appearing at the foot of page of original certified transcript of Record.

Docket No. 84896

BETTY ROGERS, O. N. BEASLEY, OSCAR  
LAWLER, JAMES K. BLAKE, EXECU-  
TORS OF THE ESTATE OF WILL ROGERS  
DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

---

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May 29—Petition received and filed. Taxpayer notified. (Fee paid)

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July 1—Copy of answer served on taxpayer.

1937

July 20—Hearing set week beginning 9/27/37, Los Angeles, California.

Sep. 27—Hearing had before Mr. Mellott on merits Submitted. Stipulation of facts filed Briefs due: Taxpayer's 11/11/37—respondent's 12/11/37—reply 12/27/37.

Nov. 10—Transcript of hearing 9/27/37 filed.

“ 10—Brief filed by taxpayer. 11/11/37 copy served.

Dec. 9—Brief filed by General Counsel.

- 1938
- Jan. 10—Motion for leave to file reply brief filed by taxpayer—reply brief lodged. 1/11/38 granted.
- “ 12—Copy of motion and reply brief served on General Counsel.
- May 18—Opinion rendered—Arthur J. Mellott, Division 11. Judgment will be entered for the respondent.
- “ 19—Decision entered—Arthur J. Mellott, Division 11.
- “ 20—Order that last paragraph of opinion promulgated 5/18/38 be corrected entered—Arthur J. Mellott, Division 11.
- Aug. 13—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.
- “ 13—Proof of service filed by taxpayer.
- Sep. 24—Certified copy of order from Ninth Circuit consolidating with 84895 for briefing and decision upon a single consolidated transcript of record consisting of such portions of the record before the Board as the parties herein may indicate by their praecipes for record—copy of this order to be incorporated in record—filed.
- “ 29—Agreed statement of evidence lodged.
- “ 29—Praeceptum for record filed with proof of service thereon.
- “ 30—Order approving statement of evidence—statement ordered filed—entered. [2]

United States Board of Tax Appeals  
Docket No. 84895

BETTY ROGERS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION

The above named petitioner hereby petitions for redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:AR:E-1 ML-90D, dated March 4, 1936, and as a basis for this proceeding alleges as follows:

1. Petitioner is an individual residing in the City of Beverly Hills, State of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) is dated March 4, 1936, and was presumably mailed on the same date.

3. The taxes in controversy are income taxes of petitioner for the calendar year 1933 in the amount of \$17,055.90.

4. The determination of the tax set forth in the notice of deficiency is based upon the following errors:

(a) Respondent erred in determining that the loss sustained by petitioner and her husband

band Will Rogers during the year 1933 in the amount of \$54,055.25 in connection with the cancellation of a certain contract to purchase real property [3] and the forfeiture of the payments theretofore made on the purchase price of said property was a capital loss.

(b) Respondent erred in refusing to allow deduction of said loss as an ordinary loss in computing the tax liability of petitioner for the calendar year 1933.

(c) Respondent erred in treating such loss as a capital loss in recomputing the tax liability of petitioner for the calendar year 1933.

5. The facts upon which petitioner relies as the basis for this proceeding are as follows:

(a) During September, 1927, petitioner and her husband, Will Rogers, purchased certain real property in the County of Los Angeles, State of California, described as follows:

Lots 163 and 164, Tract 1719, as per Map recorded in Book 21, Pages 162 and 163 of Maps, in the office of the County Recorder of Los Angeles County, State of California.

The total purchase price of said property was \$105,000.00 payable as follows: \$15,000.00 in cash at the time of the purchase; the assumption of a note in the amount of \$52,000.00 secured by a mortgage on said property and due

and payable in 1930, and the giving of a promissory note for the balance of \$38,000.00 to be secured by a Trust Deed on said property.

Petitioner and her husband, Will Rogers paid said \$15,000.00, assumed the payment of said \$52,000.00 note, and executed and delivered to the seller their promissory note for \$38,000.00 payable in 1932. In September, 1927, said property was conveyed to petitioner and her husband Will Rogers, and they conveyed said property to the [4] Title Guarantee and Trust Company as trustee, as security for the payment of said \$38,000.00 note. Said property was acquired as community property of petitioner and her husband Will Rogers. Said property was business property and the transaction was entered into for a profit.

(b) Prior to April 21, 1933 petitioner and her husband, Will Rogers, paid in full said note for \$52,000.00 which they had assumed. On April 21, 1933 said property was reconveyed by said trustee to petitioner and her husband Will Rogers and they immediately conveyed said property to the party from whom they had purchased it in 1927. The said note for \$38,000.00 was cancelled and petitioner and her husband Will Rogers forfeited said property and all payments made toward the purchase thereof.

(c) Prior to April 21, 1933 petitioner and her husband Will Rogers paid \$67,000.00 to

ward the purchase of said property and in addition thereto said escrow expenses in the amount of \$212.02, making a total of \$67,212.02. For the years 1927 to 1932, inclusive, they claimed and were allowed depreciation on the improvements on said property in the total amount of \$13,156.77. The total unrecovered cash investment in said property at the time of the forfeiture and reconveyance to the seller was \$54,055.25. Petitioner and her husband Will Rogers each sustained a loss in 1933 from said transaction in the amount of to-wit, \$27,027.62.

[5]

(d) Petitioner and her husband Will Rogers filed separate income tax returns for the calendar year 1933. In her income tax return for 1933 petitioner computed the loss on said transaction to be \$57,643.46 and deducted one-half of said sum, or \$28,821.73 as an ordinary loss in computing her net taxable income for said year. Respondent has disallowed the deduction of said loss as an ordinary loss and has determined that it was a capital loss and has treated it as a capital loss in recomputing the tax liability of petitioner for the year 1933. The deficiency herein in controversy results from respondent's determination that said loss was a capital loss.

Wherefore petitioner prays that the Board may hear and determine this appeal.

CLAUDE I. PARKER  
JOHN B. MILLIKEN  
BAYLEY KOHLMEIER

Attorneys for petitioner  
808 Bank of America Bldg.  
Los Angeles, Calif.

Of Counsel:

L. A. LUCE  
937 Munsey Building,  
Washington, D. C.

State of California  
County of Los Angeles—ss.

Betty Rogers, being first duly sworn, deposes and says; that she is the petitioner in the foregoing petition; that she is familiar with the facts stated therein and the facts so stated are true and correct except such facts as are stated upon information and belief and those facts she believes to be true.

BETTY ROGERS

Subscribed and sworn to before me this 25th day of May, 1936.

CATHERINE A. MACK  
Notary Public in and for said county and state. [6]



EXHIBIT A

Treasury Department  
Washington

Mar. 4, 1936

Office of  
Commissioner of Internal Revenue

Address reply to  
Commissioner of Internal Revenue  
and refer to

T:AR:E-1  
ML-90D

Mrs. Betty Rogers,  
407 Bank of America Building,  
Beverly Hills, California.

Madam:

You are advised that the determination of your income tax liability for the taxable year(s) 1933 discloses a deficiency of \$17,055.90, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING

Commissioner.

By (Signed) CHAS. T. RUSSELL

Deputy Commissioner.

Enclosures:

Statement

Form 870 [7]

### STATEMENT

IT:AR:E-1

ML-90D

In re: Mrs. Betty Rogers,  
407 Bank of America Building,  
Beverly Hills, California.

Income Tax Liability

Year—1933

Income Tax Liability—\$70,371.20

Income Tax Assessed—\$53,315.30

Deficiency—\$17,055.90

The deficiency shown herein is based upon the report dated October 23, 1935, prepared by Revenue

Agent P. Blackford, a copy of which was transmitted to you.

Careful consideration has been accorded your protest dated December 27, 1935, in connection with findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge.

The return has been adjusted as follows:

#### Net Income

Net income reported on the return.....\$141,098.76

Add:

(1) Salary .....	\$ 3,576.47	
(2) Reduction of business losses...	2,867.70	
(3) Loss on disposition of property .....	28,821.73	
(4) Contributions .....	400.00	
(5) Fiduciary income .....	340.00	36,005.90

Ordinary net income adjusted..... \$177,104.66

Capital net loss reported..... 0

(6) Capital net loss allowed..... \$ 27,027.62

[8]

#### Computation of Tax

Net income subject to surtax.....\$177,104.66

Less:

Personal exemption (total amount claimed by husband) .....	0
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Balance subject to normal tax.....\$177,104.66

Normal tax at 4% on \$4,000.00.....\$ 160.00

Normal tax at 8% on \$173,104.66..... 13,848.37

Surtax on \$177,104.66..... 59,741.28

Tax at 12½% on capital net loss of \$27,027.62..... ( 3,378.45)

Corrected income tax liability.....\$ 70,371.20

Income tax assessed:

Account No. 809994.....	53,315.30
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Deficiency in tax.....\$ 17,055.90

## Explanation of Changes

(1) In the deductions from gross salaries received the following items have been disallowed:

(a) The amount of \$500.00 paid to Friar's Club for a certificate of indebtedness, representing an investment, has been disallowed.

(b) The travel expense deduction has been adjusted to eliminate the following:

Personal expenses charged on hotel bills.....	\$ 961.08
Accident insurance while traveling in airplanes, a personal expense.....	3,075.50
Account #121, consisting of "cash" checks for personal use while not traveling.....	2,400.00
Total disallowed .....	<u>\$6,436.58</u>

[9]

(c) The amount claimed as depreciation on a Cadillac automobile has been corrected to allow 50% for business use instead of 75%, resulting in a disallowance of 1/3 of \$649.08, or \$216.36.

## Summary:

Amount paid for certificate of indebtedness .....	\$ 500.00
Travel expenses .....	6,436.58
Depreciation .....	216.36
Total .....	<u>\$7,152.94</u>
One-half applicable to husband's return .....	\$3,576.47
One-half applicable to wife's return .....	\$3,576.47

(2) Losses from business have been reduced as follows:

(a) Depreciation on Oklahoma ranches has been reduced from \$3,428.77 to \$2,445.41, a difference of \$983.36.

(b) The loss on Santa Monica ranch has been reduced by \$4,752.03 as follows:

The deduction for maintenance of a tennis court has been disallowed as a personal expense.....	\$ 215.45
One-half of compensation insurance has been disallowed as being personal.....	218.50
The insurance on the residence and furnishings is a personal expense.....	1,112.40
One-half of the foreman's salary is disallowed as a personal expense.....	1,500.00
Depreciation on livestock has been disallowed, because fully depreciated prior to 1933.....	720.00
One-half of the depreciation of \$1,971.36 on trucks, tractor, and buildings has been disallowed as being personal.....	985.68
	<hr/>
Total disallowed on Santa Monica Ranch.....	\$4,752.03
	[10]
Brought forward .....	\$4,752.03
Total disallowed on Oklahoma Ranches.....	983.36
	<hr/>
Total disallowed on ranches.....	\$5,735.39
One-half applicable to husband's return.....	\$2,867.69
One-half applicable to wife's return.....	\$2,867.70

(3) See (6) below.

(4) The following contributions have been disallowed as not deductible under the provisions of section 23(n) of the Revenue Act of 1932:

Ruby Adams Benefit.....	\$ 200.00
Prescott Frontier Days.....	100.00
Fox Studio Employees.....	500.00
	<hr/>
Total .....	\$ 800.00
One-half applicable to husband's return.....	\$ 400.00
One-half applicable to wife's return.....	\$ 400.00

(5) Interest of \$340.00 was received from Trust #616, Beverly Hills National Bank and Trust Company.

(6) and (3) The loss on the disposition of Bundy Bath House property has been adjusted to take into consideration

the depreciation which was allowable in 1927 and 1928, and has been held to be a capital loss rather than an ordinary loss.

Total loss as claimed.....		\$57,643.46
Loss decreased on account of depreciation allowable:		
1927 (1/2 year).....	\$1,196.07	
1928 .....	2,392.14	3,588.21
		<hr/>
Loss as corrected.....		\$54,055.25
Husband's loss .....		\$27,027.63
Wife's loss .....		\$27,027.62
		[11]

It is held that the transaction whereby you and your husband transferred all your right, title and interest in the Bundy Bath House property to Pacific Palisades Corporation in 1933 in consideration of the corporation's having cancelled and returned to you the note for \$38,000.00 which you gave in part payment therefor in 1927, amounted to an exchange of one asset for another asset, real estate for the trust deed note. Accordingly, the loss on the disposition is considered to be a capital loss falling under the provisions of section 101 of the Revenue Act of 1932. Having acquired full title to the property in 1927, you and your husband upon reconveying the property to the Pacific Palisades Corporation sustained a loss comparable to the loss which you would have suffered if you had lost the property through process of law. Such a case was con-

sidered in General Counsel Memorandum 12737 (Internal Revenue Cumulative Bulletin XIII-1, 120), and it was held that the resulting loss was a capital loss.

Due to the fact that the expiration of the period provided in the statute of limitations will presently bar any assessment of additional tax on the return filed for the year 1933, the Income Tax Unit will be unable to afford you an opportunity to protest this determination or to be accorded a hearing prior to the mailing of this statutory notice of deficiency.

Copies of this letter have been mailed to your representatives, Mr. George H. Koster, Bank of America Building, Los Angeles, California, and Mr. L. A. Luce, Munsey Building, Washington, D. C. in accordance with the authority conferred upon them in powers of attorney on file with the Bureau.

[Endorsed]: U.S.B.T.A. Filed May 29, 1936. [12]

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[Title of Board and Cause.]

### ANSWER

Comes Now the Commissioner of Internal Revenue by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the above-styled petition admits and denies as follows:

1, 2, and 3. Admits the allegations contained in Paragraphs 1, 2, and 3 of the petition.

4(a), (b) and (c). Denies that the Commissioner erred as alleged in subparagraphs (a), (b), and (c) of Paragraph 4 of the petition.

5(a) to (d), inclusive. Denies the allegations contained in subparagraphs (a) to (d), inclusive, of Paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) HERMAN OLIPHANT

General Counsel for the  
Department of the Treasury.

Of Counsel:

B. H. NEBLETT,  
HAROLD F. NONEMAN,  
Special Attorneys,  
Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed June 30, 1936. [13]

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United States Board of Tax Appeals

Docket No. 84896

BETTY ROGERS, O. N. BEASLEY, OSCAR  
LAWLER, JAMES K. BLAKE, EXECU-  
TORS OF THE ESTATE OF WILL  
ROGERS, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.



## PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:AR:E-1 ML-90D, dated March 4, 1936, and addressed to Mr. J. K. Blake, Co-executor of the Estate of Will Rogers, deceased, and as a basis for this proceeding allege as follows:

1. Petitioners are individuals residing in the County of Los Angeles, State of California, and are the duly appointed, qualified and acting Executors of the Estate of Will Rogers, deceased. Decedent, a resident of the City of Beverly Hills, California, died testate on August 15, 1935. On September 17, 1935, petitioners were duly appointed executors of the estate of Will Rogers, deceased, by the Superior Court of the State of California, in and for the County of Los Angeles. [14]

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) is dated March 4, 1936, and was presumably mailed on that date.

3. The taxes in controversy are income taxes of Will Rogers, deceased, for the calendar year 1933 in the amount of \$16,894.61.

4. The determination of the tax set forth in the notice of deficiency is based upon the following errors:

(a) Respondent erred in determining that the loss sustained by Will Rogers and his wife,

Betty Rogers, during the year 1933, in the amount of \$54,055.25 in connection with the cancellation of a certain contract a purchase real property and the forfeiture of the payments theretofore made on the purchase price of said property was a capital loss.

(b) Respondent erred in refusing to allow deduction of said loss as an ordinary loss in computing the tax liability of Will Rogers for the calendar year 1933.

(c) Respondent erred in treating such loss as a capital loss in recomputing the tax liability of Will Rogers for the calendar year 1933.

5. The facts upon which petitioners rely as the basis for this proceeding are as follows:

(a) During September, 1927, Will Rogers and his wife, Betty Rogers, purchased certain real property in the County of Los Angeles, State of California, described as follows: [15]

Lots 163 and 164, Tract 1719, as per Map recorded in Book 21, Pages 162 and 163 of Maps, in the office of the County Recorder of Los Angeles County, State of California.

The total purchase price of said property was \$105,000.00 payable as follows: \$15,000.00 in cash at the time of the purchase; the assumption of a note in the amount of \$52,000.00, secured by a mortgage on said property and due and payable in 1930, and the giving of a promissory note for the balance of \$38,000.00 to be secured by a Trust Deed on said property.

Will Rogers and his wife, Betty Rogers, paid said \$15,000.00, assumed the payment of said \$52,000.00 note, and executed and delivered to the seller their promissory note for \$38,000.00 payable in 1932. In September, 1927, said property was conveyed to Will Rogers and his wife Betty Rogers and they conveyed said property to the Title Guarantee and Trust Company as trustee, as security for the payment of said \$38,000.00 note. Said property was acquired as community property of Will Rogers and his said wife. Said property was business property and the transaction was entered into for a profit.

(b) Prior to April 21, 1933 Will Rogers and his wife Betty Rogers paid in full said note for \$52,000.00, which they had assumed. On April 21, 1933 said property was reconveyed by said trustee to Will Rogers and his wife Betty Rogers and they immediately conveyed said property to the [16] party from whom they had purchased it in 1927. The said note for \$38,000.00 was cancelled and Will Rogers and his wife Betty Rogers forfeited said property and all payments made toward the purchase thereof.

(c) Prior to April 21, 1933 Will Rogers and his wife, Betty Rogers paid \$67,000.00 toward the purchase of said property and in addition thereto paid escrow expenses in the amount of \$212.02, making a total of \$67,212.02. For the years 1927 to 1932, inclusive, they claimed and were allowed depreciation on the improvements

on said property in the total amount of \$13,156.77. The total unrecovered cash investment in said property at the time of the forfeiture and reconveyance to the seller was \$54,055.25. Will Rogers and his wife Betty Rogers each sustained a loss in 1933 from said transaction in the amount of to-wit, \$27,027.63.

(d) Will Rogers and his wife Betty Rogers filed separate income tax returns for the calendar year 1933. In his income tax return for 1933 Will Rogers computed the loss on said transaction to be \$57,643.46 and deducted one-half of said sum, of \$28,821.73 as an ordinary loss in computing his net taxable income for said year. Respondent has disallowed the deduction of said loss as an ordinary loss and has determined that it was a capital loss and has treated it as a capital loss in recomputing the tax liability of Will Rogers for the year 1933. The deficiency herein in controversy results from respondent's determination that said loss was a capital loss.

[17]

Wherefore, petitioners pray that the Board may hear and determine this appeal.

CLAUDE I. PARKER

JOHN B. MILLIKEN

BAYLEY KOHLMEIER

Attorneys for Petitioner,  
808 Bank of America Bldg.,  
Los Angeles, California.

BETTY ROGERS  
JAMES K. BLAKE  
OSCAR LAWLER

Executors of the estate of Will  
Rogers, dec'd, petitioners.

Of Counsel:

L. A. LUCE,  
937 Munsey Bldg.,  
Washington, D. C.

State of California  
County of Los Angeles—ss.

James K. Blake, of the city of Beverly Hills,  
State of California, being first duly sworn, deposes  
and says; that he is one of the duly appointed, quali-  
fied and acting executors of the estate of Will  
Rogers, deceased, and is one of the petitioners in  
the foregoing petition; that he is familiar with the  
acts stated therein and the facts so stated are true  
and correct, except such facts as are stated upon  
information and belief and those facts he believes to  
be true.

JAMES K. BLAKE

Subscribed and sworn to before me this 25th day  
of May, 1936.

CATHERINE A. MACK

Notary Public in and for the County of Los Angeles,  
State of California. [18]

## EXHIBIT A

Treasury Department  
Washington

Mar. 4, 1936

Office of  
Commissioner of Internal Revenue

Address reply to  
Commissioner of Internal Revenue

And refer to

Mr. J. K. Blake, Co-Executor,  
Estate of Will Rogers, Deceased,  
c/o Mr. Claude I. Parker,  
808 Bank of America Building,  
Los Angeles, California.

Sir:

You are advised that the determination of the income tax liability of Will Rogers, Deceased, for the taxable year 1933, discloses a deficiency of \$16,894.61, as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Wash-

ington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of the return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,  
GUY T. HELVERING,  
Commissioner.

By CHAS. T. RUSSELL  
Deputy Commissioner.

Enclosures:

Statement  
Form 870 [19]

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STATEMENT

IT:AR:E-1  
ML-90D

In re: Mr. J. K. Blake  
Co-Executor, Estate of Will Rogers, Deceased,  
c/o Mr. Claude I. Parker,  
808 Bank of America Building,  
Los Angeles, California.

Income Tax Liability

Year—1933

Income Tax Liability—\$71,799.02

Income Tax Assessed—\$54,904.41

Deficiency—\$16,894.61

The deficiency shown herein is based upon the report dated November 19, 1935, prepared by Revenue

Agent P. Blackford, covering the income tax liability of Will Rogers, Deceased, a copy of which was transmitted to you.

Careful consideration has been accorded your protest dated December 27, 1935, in connection with findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge.

The return has been adjusted as follows:

Net Income	
Net income reported on the return.....	\$144,350.72
Add:	
(1) Salary .....	\$ 3,576.47
(2) Reduction of business losses .....	2,867.69
(3) Loss on disposition of property .....	28,821.73
(4) Contributions .....	400.00
	35,665.89
Ordinary net income adjusted.....	\$180,016.61
Capital net loss reported.....	0
(5) Capital net loss allowed.....	\$ 27,027.63
Computation of Tax	
Net income subject to surtax.....	\$180,016.61
Less:	
Personal exemption and credit for dependents .....	2,900.00
Balance subject to normal tax.....	\$177,116.61
	[20
Normal tax at 4% on \$4,000.00.....	\$ 160.00
Normal tax at 8% on \$173,116.61.....	13,849.33
Surtax on \$180,016.61.....	61,168.14
Tax at 12½% on capital net loss of \$27,027.63.....	( 3,378.45
Corrected income tax liability.....	\$ 71,799.02



Income tax assessed:	
Account No. 809995.....	54,904.41
	<hr/>
Efficiency of tax.....	\$ 16,894.61

Explanation of Changes

(1) In the deductions from gross salaries received the following items have been disallowed:

(a) The amount of \$500.00 paid to Friar's Club for a certificate of indebtedness, representing an investment, has been disallowed:

(b) The travel expense deduction has been adjusted to eliminate the following:

Personal expenses charged on hotel bills.....	\$ 961.08
Accident insurance while traveling in airplanes, a personal expense.....	3,075.50
Account #121, consisting of "cash" checks for personal use while not traveling.....	2,400.00
	<hr/>
Total disallowed .....	\$6,436.58

(c) The amount claimed as depreciation on a Cadillac automobile has been corrected to allow 50% for business use instead of 75%, resulting in a disallowance of 1/3 of \$649.08, or \$216.36.

Summary:

Amount paid for certificate of indebtedness .....	\$ 500.00
Travel expenses .....	6,436.58
Depreciation .....	216.36
	<hr/>
Total .....	\$7,152.94
One-half applicable to husband's return .....	\$3,576.47
One-half applicable to wife's return .....	\$3,576.47

(2) Losses from business have been reduced as follows:

(a) Depreciation on Oklahoma ranches has been reduced from \$3,428.77 to \$2,445.41, a difference of \$983.36

(b) The loss on Santa Monica ranch has been reduced by \$4,752.03 as follows:

The deduction for maintenance of a tennis court has been disallowed as a personal expense.....	\$ 215.45
One-half of compensation insurance has been disallowed as being personal.....	218.50
The insurance on the residence and furnishings is a personal expense.....	1,112.40
One-half of the foreman's salary is disallowed as a personal expense.....	1,500.00
Depreciation on livestock has been disallowed, because fully depreciated prior to 1933.....	720.00
One-half of the depreciation of \$1,971.36 on trucks, tractor, and buildings has been disallowed as being personal.....	985.63
<hr/>	
Total disallowed on Santa Monica Ranch.....	\$4,752.03
Total disallowed on Oklahoma Ranches.....	983.36
<hr/>	
Total disallowed on ranches.....	\$5,735.39
One-half applicable to husband's return.....	\$2,867.69
One-half applicable to wife's return.....	\$2,867.70

(3) See (5) below.

(4) The following contributions have been disallowed as not deductible under the provisions of section 23(n) of the Revenue Act of 1932:

Ruby Adams Benefit.....	\$ 200.00
Prescott Frontier Days.....	100.00
Fox Studio Employees.....	500.00
<hr/>	
Total .....	\$ 800.00
One-half applicable to husband's return.....	\$ 400.00
One-half applicable to wife's return.....	\$ 400.00

(5) and (3) The loss on the disposition of Bundy Bath House property has been adjusted to take into consideration the depreciation which was allowable in 1927 and 1928, and has been held to be a capital loss rather than an ordinary loss.

Total loss as claimed.....		\$57,643.46
Loss decreased on account of depreciation allowable:		
1927 (1½ year).....	\$1,196.07	
1928 .....	2,392.14	3,588.21
		<hr/>
Loss as corrected.....		\$54,055.25
Husband's loss .....		\$27,027.63
Wife's loss .....		\$27,027.62

It is held that the transaction whereby the decedent and his wife transferred all their right, title, and interest in the Bundy Bath House property to Pacific Palisades Corporation in 1933 in consideration of the corporation's having cancelled and returned to them the note for \$38,000.00 which they gave in part payment therefor in 1927, amounted to an exchange of one asset for another asset, real estate for the trust deed note. Accordingly, the loss on the disposition is considered to be a capital loss falling under the provisions of section 101 of the Revenue Act of 1932. Having acquired full title to the property in 1927, the decedent and his wife upon reconveying the property to the Pacific Palisades Corporation sustained a loss comparable to the loss which they would have suffered if they had lost the property through process of law. Such a case was considered in General Counsel Memorandum 12737 (Internal Revenue Cumulative Bulletin XIII-1, 20), and it was held that the resulting loss was a capital loss.

Due to the fact that the expiration of the period provided in the statute of limitations will presently

bar any assessment of additional tax on the return filed for the year 1933, the Income Tax Unit will be unable to afford you an opportunity to protest this determination or to be accorded a hearing prior to the mailing of this statutory notice of deficiency.

Copies of this letter have been mailed to your representatives, Mr. George H. Koster, Bank of America Building, Los Angeles, California, and Mr. L. A. Luce, Munsey Building, Washington, D. C., in accordance with the authority conferred upon them in powers of attorney on file with the Bureau.

[Endorsed]: U.S.B.T.A. Filed May 29, 1936. [23]

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[Title of Board and Cause—Docket No. 84896.]

### ANSWER

Comes Now the Commissioner of Internal Revenue by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the above-styled petition admits and denies as follows:

1. Admits that petitioner James K. Blake is one of the duly appointed, qualified, and acting executors of the Estate of Will Rogers, Deceased. Admits that the decedent died testate on August 15, 1935. The respondent, having no information upon which to form a belief as to the remaining facts alleged in Paragraph 1, denies the same.

2 and 3. Denies the allegations contained in Paragraphs 2 and 3.

4(a), (b) and (c). Denies that the Commissioner erred as alleged in subparagraphs (a), (b) and (c) of Paragraph 4.

5(a) to (d), inclusive. Denies the allegations contained in subparagraphs (a) to (d), inclusive, of Paragraph 5.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied. [24]

Wherefore, it is prayed that the appeal be denied.

(Signed) HERMAN OLIPHANT

General Counsel for the  
Department of the Treasury.

Of Counsel:

B. H. NEBLETT,

HAROLD F. NONEMAN,

Special Attorneys,

Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed June 30, 1936. [25]



[Title of Board and Cause.]

Docket Nos. 84895, 84896. Promulgated

May 18, 1938.

Decedent and wife purchased business property for which they paid cash, assumed a note secured by a mortgage upon the property, and executed and delivered a note secured by trust deed on the same property. The first note was

paid, but the second note was not paid when it became due in 1932. In 1933, pursuant to an agreement entered into with the holder of the second note, the property was conveyed to it and the note was surrendered and canceled. Held, the conveyance of the property by decedent and his wife in consideration for the cancellation of their debt was a "sale" within the meaning of that word as used in section 101 (c) (2) of the Revenue Act of 1932 and the loss sustained was a capital loss.

Claude I. Parker, Esq., John B. Milliken, Esq., Bayley Kohlmeier, Esq., and L. A. Luce, Esq., for the petitioners.

DeWitt M. Evans, Esq., for the respondent.

#### OPINION.

Mellott: These consolidated proceedings involve deficiencies in income taxes for the year 1933 in the amount of \$17,055.90 in Docket No. 84895 and \$16,894.61 in Docket No. 84896. The respondent decreased a marital community loss, one-half of which was deducted by each member of the community as an ordinary loss, from \$57,643.46 to \$54,055.25, and treated it as a capital loss sustained equally by each member of the community. The only question involved is whether such loss is a capital loss or an ordinary loss.

The proceedings were submitted upon two stipulations of facts which, except for the purely forma

arts, are substantially the same. These stipulations are included herein by reference, a combined summary being sufficient for the purpose of the report.

[26]

The petitioner, Betty Rogers, a resident of California, is the widow of Will Rogers, who died testate, a resident of California, on August 15, 1935. She, and the others shown in the caption in Docket No. 84896, were appointed executors of the estate of the decedent by the Superior Court of the State of California in and for the County of Los Angeles, on September 17, 1935.

During September 1927 the decedent and his wife purchased for profit certain business real estate situated in the county of Los Angeles, California, at a price of \$105,000, payable as follows: \$15,000 cash at the time of purchase, the assumption of a note in the amount of \$52,000, which was secured by a mortgage on such property and became due and payable in 1930, and the giving of their promissory note for the balance of \$38,000, secured by a trust deed on the property.

The decedent and his wife paid the \$15,000 cash and prior to 1933 paid in full the \$52,000 note.

The note for \$38,000 and the beneficial interest under the deed of trust which secured it were transferred and assigned to the California Trust Co., a corporation. The note became due and payable on August 19, 1932.

On August 25, 1932, payment of the note and accrued interest thereon was demanded of decedent

and his wife and notice was given that, unless the principal and interest were paid, the holder of such note would proceed to enforce its rights under the provisions of the deed of trust given to secure payment of it.

Thereafter it was agreed by and between decedent and his wife and the holder of the \$38,000 note and trust deed that the property be conveyed by the former to the latter and that the note be canceled and surrendered. Thereafter the property was reconveyed by the Title Guarantee & Trust Co. to the decedent and his wife and on April 21, 1933, they transferred and conveyed it to the California Trust Co., and the \$38,000 note was surrendered to decedent and his wife and canceled.

In addition to the \$67,000 paid by the decedent and his wife upon the purchase price of the property they also paid, prior to April 21, 1933, escrow expenses in the amount of \$212.02, or a total of \$67,212.02. For the years 1927 to 1932, inclusive, they were allowed depreciation on the improvements on the property in the total amount of \$13,156.77. Their total unrecovered cash investment in such property at the time of its conveyance to the California Trust Co. was \$54,055.25. The decedent and his wife each sustained a loss in 1933 from the transaction in the amount of \$27,027.62.

The decedent and his wife filed separate returns for 1933. They computed a loss on the transaction in the amount of \$57,643.46 and [27] each deducted one-half of that sum, or \$28,821.73, as an ordinary



loss, under the provisions of section 23 (e) of the Revenue Act of 1932. The respondent reduced the amount of the loss to \$54,055.25, and, in recomputing the tax liability of each of them, treated the loss as a capital loss within the meaning of section 101 of the Revenue Act of 1932. The deficiencies result from respondent's determination that the loss was a capital loss.

The pertinent provisions of the Revenue Act of 1932 are shown in the margin.<sup>1</sup>

Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

\* \* \* \* \*

(e) Losses by Individuals.—Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

\* \* \* \* \*

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business. \* \* \*

Sec. 101. Capital Net Gains and Losses.

\* \* \* \* \*

(b) Tax in Case of Capital Net Loss.—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital

Petitioners argue that Rogers and his wife did not “have whole title to the property \* \* \* but \* \* \* merely an equity and a right to receive whole and complete title on completion of payment of the purchase price.” That may be true; however, the property was deeded to them subject to the indebtedness which they assumed and paid, and it is stipulated that they claimed and were allowed depreciation on the improvements on it in the total amount of \$13,156.77. The property was acquired in a transaction entered into for profit. It will be noted that “ ‘capital assets’ means property held by the taxpayer for more than two years.” Under the facts as stipulated, we think that the conclusion is inescapable that the real estate was “held” for more than two years within the purview of the statute.

net loss be less than the tax computed without regard to the provisions of this section.

(c) Definitions.—for the purposes of this title—  
\* \* \* \* \*

(2) “Capital loss” means deductible loss resulting from the sale or exchange of capital assets.  
\* \* \* \* \*

(6) “Capital net loss” means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.  
\* \* \* \* \*

(8) “Capital assets” means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. \* \* \* [28]

Petitioners insist, however, that even though the property was a capital asset, the loss sustained upon its disposition was not a capital loss, as defined by the statute, because it was neither sold nor exchanged. Having decided that the property was a capital asset, the only remaining question is whether it was sold or exchanged.

On brief petitioners argue that when the entire transaction was completed they were left with nothing which they did not have prior to entering into the contract or purchase and that they had suffered an actual loss in the amount of \$54,055.25 (\$67,212.02 less \$13,156.77); that in construing or interpreting a statute the ordinary meaning of the words used therein should be taken, citing *Old Colony Railroad Co. v. Commissioner*, 284 U. S. 552; and that the transaction in question did not involve a "sale or exchange" within the ordinary meaning of these words because they connote an acquisition of property by the bargaining parties through the exercise of a free will to buy and sell rather than the compromise of an outstanding indebtedness, the enforced collection of which had been threatened by means of legal proceedings.

We agree with petitioners that in construing or interpreting a statute the ordinary meaning of the words used should be taken. "A sale, in the ordinary sense of the word is a transfer of property for a fixed price in money or its equivalent." *Iowa v. McFarland*, 110 U. S. 471, 478. "An exchange of property is a mutual transfer of one or more pieces

of property for property other than money.” 23 C. J. 184. “ ‘The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred; and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter.’ ” *Hale v. Helvering*, 85 Fed.(2d) 819.

Prior to the transaction here involved petitioners had paid for the real estate \$67,212.02 in cash, and had given their note for \$38,000 to the vendor. This note had been transferred and assigned by the vendor to the California Trust Co. It is apparent, therefore, that the real property cost petitioners \$105,212.02 and this amount (less depreciation allowed, \$13,156.77) was their basis for gain or loss upon its sale or other disposition. We are not impressed with petitioners' argument that when they transferred the property to their creditor they merely paid their debt of \$38,000, and that therefore there was no sale or exchange. We agree that they paid a debt; but the payment of a debt does not entitle a taxpayer to a loss deduction. Petitioners' claim for a deduction is based on the fact that they made a disposition of property and thereby sustained a loss. It can not be said that they received no consideration because then their loss [29] would have been \$92,055.25 (\$105,212.02 less \$13,156.77) and not \$54,055.25. By reason of the transfer of the property to their creditor petitioner were released from their promise to pay \$38,000, and their credi-

or relinquished its right to collect this amount. In our opinion the transaction should be treated either as a sale of petitioners' right, title, and interest in the property for the price of their obligation or as an exchange of real estate for the obligation, both properties having an equal value. We prefer to regard the transaction as a sale. This view is supported by a decision of the Supreme Judicial Court of Massachusetts in *Gallus v. Elmer*, 193 Mass. 106; 8 N. E. 772. In that case Gallus, who conducted a butcher and grocery business, sold certain fixtures, tools, utensils, and goods used in carrying on that business to one Kopec for \$500, of which \$100 was paid in cash, and the balance was to be paid on June 9, 1905. On June 9 Gallus demanded payment of the amount due, which was not paid. Kopec stated he was willing that Gallus should take all of the property in payment of the debt due, and an instrument was prepared reciting that Kopec, in consideration of \$400 paid by Gallus, sold, transferred, and delivered all of the property back to Gallus. The question arose whether the transfer of the property to Gallus in payment of the debt due constituted a sale under the "Bulk Sales" act. In holding that it did the court said:

\* \* \* While it is true that in its strictest sense a sale is a transfer of personal property in consideration of money paid or to be paid, still in the interpretation of statutes it is often held to include barter and any transfer of personal

property for a valuable consideration. "In a general and popular sense, the sale of an article signifies the transfer of property from one person to another, for a consideration of value, without reference to the particular mode in which the consideration is paid." Bigelow, C. J., in *Howard v. Harris*, 8 Allen 297, 299.

\* \* \*

In support of their contention that the transaction was neither a sale nor an exchange petitioners rely upon *Hale v. Helvering*, supra; *Commonwealth, Inc.*, 36 B. T. A. 850; and *Dallas Transfer & Terminal Warehouse Co. v. Commissioner*, 70 Fed.(2d) 95.

In *Hale v. Helvering*, supra, the taxpayers in 1925 sold an orange grove for the sum of \$60,000. Title was transferred to the purchaser upon the payment of \$20,000 in cash and the execution and delivery of \$40,000 in notes secured by first mortgage. The taxpayers each reported their pro rata share of the profit upon this transaction in 1925, and paid the tax thereon. Upon maturity of the notes in 1927, the maker, although financially able to pay, refused to do so. A suit was instituted during the year 1929 to collect in the amount of \$22,418.24, but prior to judgment, and during that year, a settlement was agreed to which resulted in a loss to the taxpayers of [30] \$7,497.22. In holding that the loss was an ordinary loss the Court of Appeals for the District of Columbia said:

Accepting the definitions relied upon by the petitioner as constituting the ordinary meaning of the words in question, such definitions do not include the disposition of the notes under the facts here. There was no acquisition of property by the debtor, no transfer of property to him. Neither business men nor lawyers call the compromise of a note a sale to the maker. In point of law and in legal parlance property in the notes as capital assets was extinguished, not sold. In business parlance the transaction was a settlement and the notes were turned over to the maker, not sold to him. In *John H. Watson, Jr., v. Commissioner of Internal Revenue*, 27 B. T. A. 463, overruling *Henry P. Werner v. Commissioner of Internal Revenue*, 15 B. T. A. 482, it was held that the payment at maturity, of the face amount of bonds purchased at a premium, was not a sale or exchange resulting in a capital loss. If the full satisfaction of an obligation does not constitute a sale or exchange, neither does partial satisfaction. \* \* \*

The court held, as this Board has held, "that the compromise with the maker, who was able to pay them, of promissory notes, for less than their face value, does not constitute a sale or exchange of capital assets."

While we agree with the court that under the facts of the Hale case the compromise of a note was not a "sale" or an "exchange", because the prop-

erty in the notes was extinguished, and not sold, we do not believe that this case is controlling of the instant proceedings. Petitioners disposed of real property. They are claiming the right to a loss deduction for the reason that the amount realized was less than the cost of the property to them. No compromise of a note is involved. Petitioners gave up all of their right, title, and interest in the real property for the equivalent of \$38,000, and thereby reduced the amount of the loss resulting from their investment in the property by that amount. If petitioners had transferred the property for \$38,000 in cash and then had used the cash to satisfy their indebtedness, it is clear that they would have made a sale of their property. We do not believe that the situation is changed where the property is transferred directly to the creditor in satisfaction of the indebtedness. Cf. *United States v. Hendler*, ..... U. S. .... (Mar. 28, 1938); *E. F. Simms*, 28 B. T. A. 988, 1030. We do not construe the decision in the *Hale* case as meaning that the surrender of notes or cancellation of an indebtedness is not sufficient or proper consideration to support a sale. Many courts have held that the extinguishment of a preexisting debt may constitute a valuable consideration for a sale of property. *Ferguson v. Larson* (Cal.), 33 Pac. (2d) 1061; *Bank of Centralia v. Chicago, Burlington & Quincy Railroad Co.*, 245 Ill. App. 211; *David Bradley & Co. v. Kingman Implement Co.*, 79 Neb. 144; 112 N. W. 346; *Rachman v. Clapp*, 50 Neb. 648.



7 N. W. 259; *Billings v. Warren*, 21 Tex. Civ. App. 7; 50 S. W. 625. [31]

In *Commonwealth, Inc.*, supra, also cited and relied upon by petitioners, the owner of realty, subject to a mortgage, deeded the property to the mortgagee without consideration and thereby sustained a loss. We held that the loss so sustained was an ordinary loss, and not a capital loss, and, among other things, said:

\* \* \* The purported release of liability under the mortgage was of no benefit to the petitioner, for it had no liability under the mortgage. Neither the petitioner nor its grantor assumed the mortgage liability, but took title, subject to it. Hence, there was no personal liability on the part of the petitioner. *Hulin v. Veatch*, 148 Or. 119; 35 Pac. (2d) 253; *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436; *Fulton Gold Corporation*, 31 B. T. A. 519. Inasmuch as there was in fact no consideration to the petitioner, the transfer of title was not a sale or exchange. The execution of the deed marked the close of a transaction whereby petitioner abandoned its title. Cf. *A. J. Schwarzler Co.*, 3 B. T. A. 535, *Greenleaf Textile Corporation*, 26 B. T. A. 737, holding that a taxpayer does not sustain a deductible loss of the value of real estate while retaining title to it.

The instant proceedings are clearly distinguishable from *Commonwealth, Inc.*, supra. In that case

the taxpayer received nothing in consideration of the transfer of the property to the mortgagee. Here, however, the taxpayers received a consideration of \$10 and "in addition \* \* \* full satisfaction of all obligations secured by the deed of trust [the \$38,000 note]." The deed recites that "the consideration received by the grantors is equal to the fair value of grantors interest in said land."

The remaining case relied upon by the petitioners in *Dallas Transfer & Terminal Warehouse Co. v. Commissioner*, *supra*. There the taxpayer leased a warehouse for 20 years at a rental of \$7,000 a month. By September 1928 the taxpayer owed its lessor \$107,880.79 and was in an insolvent condition. It entered into an agreement with its lessor under the terms of which it conveyed to the latter certain property in which it had an equity of \$17,507.20, and the lessor canceled the balance of the debt, charging it off as worthless. The Circuit Court of Appeals for the Fifth Circuit, in holding that the transaction did not constitute income to the taxpayer, said:

\* \* \* The transaction was not in form or substance a sale for \$107,880.77 of property which had an appraised value of \$17,507.20. In effect the transaction was similar to what occurs in an insolvency or bankruptcy proceeding when, upon a debtor surrendering, for the benefit of his creditors, property insufficient, in value to pay his debts, he is discharged from liability for his debts. This does not result in the debtor ac-

quiring something of exchangeable value in addition to what he had before. There is a reduction or extinguishment of liabilities without any increase of assets. There is an absence of such a gain or profit as is required to come within the accepted definition of income. \* \* \* It hardly would be contended that a discharged insolvent or bankrupt receives taxable income in the amount by which his provable debts exceed the value of his surrendered assets. \* \* \* Taxable income is not [32] acquired by a transaction which does not result in the taxpayer getting or having anything he did not have before. Gain or profit is essential to the existence of taxable income. A transaction whereby nothing of exchangeable value comes to or is received by a taxpayer does not give rise to or create taxable income. \* \* \*

In our opinion there is nothing in the decision of the court which is contrary to the conclusion we have reached in the instant proceedings. We are convinced that petitioners made a sale of a capital asset to their creditor. We therefore hold that the respondent's determination that the loss sustained was a capital loss is correct.

Reviewed by the Board.

Judgment will be entered for the respondent. [33]

United States Board of Tax Appeals  
Washington

Docket No. 84895.

BETTY ROGERS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated May 18, 1938, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1933 in the amount of \$17,055.90.

Entered May 19, 1938.

[Seal] (Signed) ARTHUR J. MELLOTT,  
Member. [34]

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United States Board of Tax Appeals  
Washington

Docket No. 84896.

BETTY ROGERS, O. N. BEASLEY, OSCAR  
LAWLER, JAMES K. BLAKE, Executors of  
the Estate of Will Rogers, Deceased,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated May 18, 1938, is

Ordered and Decided: That there is a deficiency in income tax for the year 1933 in the amount of 16,894.61.

Entered May 19, 1938.

[Seal] (Signed) ARTHUR J. MELLOTT,  
Member. [35]

[Title of Board and Cause.]

Docket No. 84895

PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Betty Rogers, by her attorneys, Claude I. Parker, John B. Milliken, Bayley Kohlmeier, Harriet Geary and L. A. Luce and respectfully shows:

I.

Jurisdiction

Betty Rogers, your petitioner, respectfully petitions this Honorable Court to review the decision of the United States Board of Tax Appeals entered on May 19, 1938, and finding a deficiency in income tax due from your petitioner for the calendar year 1933 in the amount of \$17,055.90.

Your petitioner at the time of filing this petition is a citizen of the United States and resides in Los Angeles County, State of California. [36]

The return of income tax in respect of which the aforementioned tax liability arose was filed by your petitioner with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, located in the City of Los Angeles, State of California, which is located within the jurisdiction of the Circuit Court of Appeals for the Ninth Judicial Circuit.

Jurisdiction in this Court to review the decision of the United States Board of Tax Appeals aforesaid is founded on Sections 1001-3 of the Revenue Act of 1926 as amended by Sections 603 of the Revenue Act of 1928, 1101 of the Revenue Act of 1932 and 1519 of the Revenue Act of 1934.

The Commissioner determined a deficiency in petitioner's income taxes for the calendar year 1936 in the amount of \$17,055.90 and on March 4, 1937 in accordance with the provisions of Section 274 of the Revenue Act of 1926, sent to petitioner by registered mail a notice of said deficiency. Thereafter petitioner filed an appeal from said determination of deficiency with the United States Board of Tax Appeals.

Said appeal was called for hearing by the Board of Tax Appeals on September 27, 1937 at Los Angeles, California. At said hearing upon motion of counsel, it was ordered that said appeal be consolidated for hearing and decision with the appeal of Betty Rogers, O. N. Beasley, Oscar Lawler, James K. Blake, Executors of the Estate of Will Rogers

ceased, for the same year and involving identical issues of fact and law. Docket No. 84896. On May 8, 1938 the Board promulgated its opinion in which the [37] stipulation of facts of the parties containing the only facts presented in the proceeding was incorporated by reference and on May 19, 1938, the Board of Tax Appeals entered its decision, as foresaid.

## II.

### Nature of Controversy.

The deficiency for the year 1933, which was in controversy before the Board of Tax Appeals, arose and resulted from the determination of the Commissioner that the loss of \$27,027.62 sustained by petitioner in that year constituted a capital loss for income tax purposes as distinguished from an ordinary loss as claimed and maintained by petitioner.

During September 1927, petitioner and her husband Will Rogers, now deceased, purchased from Oren B. Waite certain real property in the County of Los Angeles, State of California, for a total purchase price of \$105,000.00 payable as follows: \$15,000.00 cash at time of purchase, assumption of a note in the amount of \$52,000.00 secured by a mortgage on the property and the giving of a promissory note for the balance of \$38,000.00 secured by a trust deed on the property. The \$15,000.00 cash was paid, the payment of the note was assumed and petitioner and her husband executed and delivered to the seller their note in the amount of \$38,000.00, payable on or before August 19, 1932 with interest

at seven per cent per annum. The property was conveyed to petitioner and her husband subject to the mortgage and immediately thereafter they conveyed it to Title Guarantee and Trust Company, a corporation, as trustee, to secure payment of the \$38,000.00 note. [38]

This property was acquired by petitioner and her husband as community property. It was business property and the transaction was one entered into for profit.

Before 1933 petitioner and her husband paid the \$52,000.00 note which had been assumed by them in full. Also, before 1933, the \$38,000.00 note payable to Oren B. Waite, the seller, and the beneficial interest under the trust deed were duly transferred and assigned to California Trust Company, a corporation. On August 19, 1932 the note became due and payable. It was not paid on the due date and on August 25, 1932, payment was demanded of petitioner and her husband and notice was given that unless the same was paid, the holder thereof would proceed to enforce its rights under the deed of trust.

Therafter it was agreed by petitioner and her husband and the holder of said \$38,000.00 note that cancellation of said note could be accomplished by conveyance of the property by which it was secured to the holder of the note. Thereafter, in the year 1933, this was done and the note was surrendered to petitioner and her husband and cancelled. Thus, prior to April 21, 1933, petitioner and her husband paid \$67,000.00 toward the purchase price of the property, and in addition thereto, paid escrow



xpenses in the amount of \$212.02, or a total of \$7,212.02. For the years 1927 to 1932, inclusive, petitioner and her husband claimed and were allowed depreciation on the improvements on said property in the total amount of \$13,156.77. The total loss in cash investment was therefore \$54,555.25 and petitioner by reason of the community property character of the property sus- [39] tained one-half of said total loss or the sum of \$27,027.62.

The Commissioner determined that the loss on this transaction constituted a capital rather than an ordinary loss to petitioner for the year 1933 and disallowed the ordinary loss claimed by petitioner on her return and treated the loss in the amount aforesaid as a capital loss.

The Board of Tax Appeals sustained the Commissioner's aforesaid determination and affirmed the deficiency resulting therefrom.

### III.

#### Assignment of Error.

In making its decision as aforesaid, the United States Board of Tax Appeals committed the following errors on which your petitioner relies as the basis of this proceeding:

1. The United States Board of Tax Appeals erred in ordering a deficiency in petitioner's income tax for the calendar year 1933 in the amount of \$17,055.90.

2. The United States Board of Tax Appeals erred in deciding that the loss sustained by

petitioner in the year 1933 on reconveyance of the property in question in payment and cancellation of her and her husband's liability on their outstanding note leaving unrecovered a cash investment in the property in the amount of \$27,027.62 was a capital loss for income tax purposes for the reason that as a matter of law the loss occurring under such circumstances constituted an ordinary loss under the applicable Revenue Act. [40]

3. The United States Board of Tax Appeals erred in holding that the loss sustained by a purchaser of real property upon reconveyance of said property to cancel the balance due on the purchase money note and forfeiture of prior cash payments, constituted a capital rather than an ordinary loss under the Revenue Act of 1932.

4. The United States Board of Tax Appeals erred as a matter of law in deciding that the reconveyance of purchased premises, subject to a trust deed given to secure the payment of a purchase money note, in cancellation of the indebtedness thereon, constituted a sale of a capital asset, the loss suffered from the sale of which was a capital loss.

5. The United States Board of Tax Appeals erred in ordering that petitioner was not entitled to deduct for income tax purposes an ordinary loss in the amount of \$27,027.62 in the calendar year 1933 by reason of the reconveyance of certain property, which she had pur-

chased and which was subject to a trust deed to secure the payment of the remainder of the purchase price, and forfeiture of the cash purchase price theretofore paid thereon, for the reason that such order of the United States Board of Tax Appeals is contrary to the facts stipulated by the parties to this proceeding and the law applicable thereto.

Wherefore your petitioner prays that this Honorable Court may review the decision and order of the United States Board of Tax Appeals and set aside the same and direct the entry [41] of a decision by said Board determining that there is no deficiency in income tax for the year 1933, greater than \$5,028.61, which amount is conceded by petitioner herein, due from the petitioner, and for such other and further relief as may to this Court seem proper in the premises.

CLAUDE I. PARKER

JOHN B. MILLIKEN

BAYLEY KOHLMEIER

HARRIET GEARY

L. A. LUCE

Attorneys for Petitioner.

State of California

County of Los Angeles.—ss.

Harriet Geary being first duly sworn says: I am one of the attorneys for the petitioner in this proceeding. I prepared the foregoing petition and am

familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information and belief. This petition is not filed for the purpose of delay and I believe the petitioner is justly entitled to the relief sought.

HARRIET GEARY

Subscribed and sworn to before me this 5th day of August, 1938.

PEARL ANDERSON

Notary Public in and for the County of  
Los Angeles, State of California.

[Endorsed]: U.S.B.T.A. Filed Aug. 13, 1938

[42]

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[Title of Board and Cause—No. 84895.]

To: Hon. Guy T. Helvering,  
Commissioner of Internal Revenue,  
Internal Revenue Building,  
Washington, D. C.

Hon. J. P. Wenchel, Attorney for Respondent,  
Chief Counsel,  
Bureau of Internal Revenue,  
Internal Revenue Building,  
Washington, D. C.

You Are Hereby Notified that on the 13th day of August, 1938, a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of

Tax Appeals heretofore rendered in the above entitled cause, was filed with the Clerk of the Board. A copy of the petition as filed is attached hereto and served upon you.

Dated:

CLAUDE I. PARKER  
JOHN B. MILLIKEN  
BAYLEY KOHLMEIER  
HARRIET GEARY

Attorney for Petitioner  
808 Bank of America Bldg.  
Los Angeles, California.

Of Counsel:

L. A. LUCE  
937 Munsey Bldg.,  
Washington, D. C. [43]

Service of the foregoing notice of filing and of a copy of the petition for review is hereby acknowledged this 13th day of August, 1938.

J. P. WENCHEL

Chief Counsel for the  
Bureau of Internal Revenue,  
Attorney for Respondent.

[Endorsed]: U.S.B.T.A. Filed Aug. 13, 1938. [44]

[Title of Board and Cause—Docket No. 84896.]

PETITION FOR REVIEW BY THE UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now Betty Rogers, O. N. Beasley, Oscar Lawler, James K. Blake, Executors of the Estate of Will Rogers, deceased, by their attorneys, Claude I. Parker, John B. Milliken, Bayley Kohlmeier, Harriet Geary and L. A. Luce, and respectfully show:

I.

Jurisdiction

Betty Rogers, O. N. Beasley, Oscar Lawler, James K. Blake, Executors of the Estate of Will Rogers, deceased, your petitioners, respectfully petition this Honorable Court to review the decision of the United States Board of Tax Appeals entered on May 19, 1938, and finding a deficiency in income tax due from the estate of Will Rogers, deceased for the calendar year 1933 in the amount of \$16,894.91. [45]

Your petitioners at the time of filing this petition are citizens of the United States and reside in Los Angeles County, State of California.

The return of income tax in respect of which the aforementioned tax liability arose was filed by Will Rogers, now deceased, with the Collector of Internal Revenue for the Sixth Internal Revenue Collection

District of California, located in the City of Los Angeles, State of California, which is located within the jurisdiction of the Circuit Court of Appeals for the Ninth Judicial Circuit.

Jurisdiction in this Court to review the decision of the United States Board of Tax Appeals afore-said, is founded on Sections 1001-3 of the Revenue Act of 1926 as amended by Sections 603 of the Revenue Act of 1928, 1101 of the Revenue Act of 1932 and 1519 of the Revenue Act of 1934.

The Commissioner determined a deficiency in petitioner's income taxes for the calendar year 1933 in the amount of \$16,894.91 and on March 4, 1936 in accordance with the provisions of Section 274 of the Revenue Act of 1926, sent to petitioners by registered mail a notice of said deficiency. Thereafter petitioners filed an appeal from said determination of deficiency with the United States Board of Tax Appeals.

Said appeal was called for hearing by the Board of Tax Appeals on September 27, 1937 at Los Angeles, California. At said hearing upon motion of counsel, it was ordered that said appeal be consolidated for hearing and decision with the appeal of Betty Rogers for the same year and involving identical issues of fact and law, Docket No. 84895. On May 18, 1938 the [46] Board promulgated its opinion in which the stipulation of facts of the parties containing the only facts presented in the proceeding was incorporated by reference and on

May 19, 1938, the Board of Tax Appeals entered its decision, as aforesaid.

## II.

### Nature of Controversy.

The deficiency for the year 1933, which was in controversy before the Board of Tax Appeals, arose and resulted from the determination of the Commissioner that the loss of \$27,027.63 sustained by Will Rogers in that year constituted a capital loss for income tax purposes as distinguished from an ordinary loss as claimed by Will Rogers and maintained by petitioners.

During September 1927, Will Rogers and his wife, Betty Rogers, purchased from Oren B. Waite certain real property in the County of Los Angeles, State of California, for a total purchase price of \$105,000.00 payable as follows: \$15,000.00 cash at time of purchase, assumption of a note in the amount of \$52,000.00 secured by a mortgage on the property and the giving of a promissory note for the balance of \$38,000.00 secured by a trust deed on the property. The \$15,000.00 cash was paid, the payment of the note was assumed and Mr. and Mrs. Rogers executed and delivered to the seller their note in the amount of \$38,000.00, payable on or before August 19, 1932, with interest at seven per cent per annum. The property was conveyed to Mr. and Mrs. Rogers subject to the mortgage and immediately thereafter they conveyed it to Title Guarantee and Trust Company, a corporation, as trustee,



to [47] secure payment of the \$38,000.00 note.

This property was acquired by Mr. and Mrs. Rogers as community property. It was business property and the transaction was one entered into for profit.

Before 1933 Mr. and Mrs. Rogers paid the \$52,000.00 note which had been assumed by them in full. Also before 1933, the \$38,000.00 note payable to Dren B. Waite, the seller, and the beneficial interest under the trust deed were duly transferred and assigned to California Trust Company, a corporation. On August 19, 1932 the note became due and payable. It was not paid on the due date and on August 25, 1932, payment was demanded of Mr. and Mrs. Rogers and notice was given that unless the same was paid, the holder thereof would proceed to enforce its rights under the deed of trust.

Thereafter it was agreed by Mr. and Mrs. Rogers and the holder of said \$38,000.00 note that cancellation of said note could be accomplished by conveyance of the property by which it was secured to the holder of the note. Thereafter in the year 1933 this was done and the note was surrendered to Mr. and Mrs. Rogers and cancelled. Thus prior to April 1, 1933 Mr. and Mrs. Rogers paid \$67,000.00 toward the purchase price of the property, and in addition hereto, paid escrow expenses in the amount of 212.02 or a total of \$67,212.02. For the years 1927 to 1932 inclusive, Mr. and Mrs. Rogers claimed and were allowed depreciation on the improvements on said property in the total amount of \$13,156.77. The

total loss in cash investment was therefore \$54,055.25 and by reason of the community property character of [48] the property Will Rogers sustained one-half of said total loss or the sum of \$27,027.62.

The Commissioner determined that the loss on this transaction constituted a capital rather than an ordinary loss to Mr. Rogers for the year 1933 and disallowed the ordinary loss claimed by him on his return and treated the loss in the amount aforesaid as a capital loss.

The Board of Tax Appeals sustained the Commissioner's aforesaid determination and affirmed the deficiency resulting therefrom.

### III.

#### Assignment of Error.

In making its decision as aforesaid, the United States Board of Tax Appeals committed the following errors on which your petitioners rely as the basis of this proceeding:

1. The United States Board of Tax Appeals erred in ordering a deficiency income tax of Will Rogers, deceased, for the calendar year 1933 in the amount of \$16,894.61.

2. The United States Board of Tax Appeals erred in deciding that the loss sustained by Will Rogers, deceased, in the year 1933 on reconveyance of the property in question in payment and cancellation of his and his wife's liability

on their outstanding note leaving unrecovered a cash investment in the property in the amount of \$27,027.63, was a [49] capital loss for income tax purposes for the reason that as a matter of law the loss occurring under such circumstances constituted an ordinary loss under the applicable Revenue Act.

3. The United States Board of Tax Appeals erred in holding that the loss sustained by a purchaser of real property upon reconveyance of said property to cancel the balance due on the purchase money note and forfeiture of prior cash payments constituted a capital rather than an ordinary loss under the Revenue Act of 1932.

4. The United States Board of Tax Appeals erred as a matter of law in deciding that the reconveyance of purchased premises subject to a trust deed given to secure the payment of a purchase money note, in cancellation of the indebtedness thereon constituted a sale of a capital asset, the loss suffered from the sale of which was a capital loss.

5. The United States Board of Tax Appeals erred in ordering that Will Rogers was not entitled to deduct for income tax purposes an ordinary loss in the amount of \$27,027.63 in the calendar year 1933 by reason of the reconveyance of certain property which he had purchased and which was subject to a trust deed to secure the payment of the remainder of the purchase price and forfeiture of the cash pur-

chase price theretofore paid thereon, for the reason [50] that such order of the United States Board of Tax Appeals is contrary to the facts stipulated by the parties to this proceeding and the law applicable thereto.

Wherefore your petitioners pray that this Honorable Court may review the decision and order of the United States Board of Tax Appeals and set aside the same and direct the entry of a decision by said Board determining that there is no deficiency in income tax due from petitioners, as executors of the estate of Will Rogers, deceased, greater than \$4,867.31, which amount is conceded by petitioners, and for such other and further relief as may to this Court seem proper in the premises.

CLAUDE I. PARKER

JOHN B. MILLIKEN

BAYLEY KOHLMEIER

HARRIET GEARY

L. A. LUCE

Attorneys for Petitioners.

State of California

County of Los Angeles—ss.

Harriet Geary being first duly sworn says; I am one of the attorneys for the petitioners in this proceeding. I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information and belief. This petition is not filed [51] for the purpose of delay and I be-

believe the petitioners are justly entitled to the relief sought.

HARRIET GEARY

Subscribed and sworn to before me this 5th day of August, 1938.

PEARL ANDERSON

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: U. S. B. T. A. Filed Aug. 13, 1938.

[52]

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[Title of Board and Cause—Docket No. 84896.]

To: Hon. Guy T. Helvering,  
Commissioner of Internal Revenue,  
Internal Revenue Building,  
Washington, D. C.

Hon. J. P. Wenchel, Attorney for Respondent,  
Chief Counsel,  
Bureau of Internal Revenue,  
Internal Revenue Building,  
Washington, D. C.

You are hereby notified that on the 13th day of August, 1938, a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals heretofore rendered in the above entitled cause, was filed with the Clerk of the

Board. A copy of the petition as filed is attached hereto and served upon you.

Dated:

CLAUDE I. PARKER  
JOHN B. MILLIKEN  
BAYLEY KOHLMEIER  
HARRIET GEARY

Attorneys for Petitioners.  
808 Bank of America Bldg.,  
Los Angeles, California.

Of Counsel:

L. A. LUCE

937 Munsey Bldg.,

Washington, D. C. [53]

Service of the foregoing notice of filing and of a copy of the petition for review is hereby acknowledged this 13th day of August, 1938.

J. P. WENCHEL

Chief Counsel for the Bureau  
of Internal Revenue  
Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed Aug. 13, 1938.

[54]

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[Title of Board and Cause—Docket Nos. 84895 and  
84896.]

### STATEMENT OF EVIDENCE.

The above entitled cases came on for hearing at Los Angeles, California, before the Hon. Arthur J.

Mellott, Member of the United States Board of Tax Appeals on the 27th day of December, 1937, Claude L. Parker, John B. Milliken and Bayley Kohlmeier. Esqs., appearing on behalf of petitioners and J. P. Wenchel, Esq., appearing on behalf of the respondent.

At the time of said hearing, said above mentioned cases were consolidated for the purpose of hearing and argument pursuant to the order of said Hon. Arthur J. Mellott, Member, presiding. [55]

Thereupon the petitioners, to maintain the issues in their behalf, introduced in evidence Stipulations of Facts together with certain exhibits attached to said Stipulations, the same being all of the facts and evidence introduced at said hearing. For the reason that each of said Stipulations covers and relates to identical facts with the exception of certain formal facts having to do with the death of the taxpayer, Will Rogers, and the appointment of petitioners Betty Rogers, O. N. Beasley, Oscar Lawler and James K. Blake, as executors of his estate, and for the reason that the exhibits referred to and attached to the separate Stipulations are identical, the Stipulation of Facts in the case of Betty Rogers, O. N. Beasley, Oscar Lawler and James K. Blake, Executors of the Estate of Will Rogers, deceased, vs. Commissioner of Internal Revenue, Docket No. 84896, will be set out in full in this statement of evidence together with the exhibits attached thereto and only those paragraphs in the Stipulation filed in the case of Betty Rogers v.

Commissioner of Internal Revenue, Docket No. 84895 in which there are any facts substantially new or different from those presented in the Stipulation in Docket No. 84896 will be included in this statement of evidence in order that the record may not be encumbered by the repetitious matter:

[56]

[Title of Board and Cause—Docket No. 84896.]

### STIPULATION OF FACTS.

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel of record, that the following are true and material facts involved in this cause and may be found as facts by the Board of Tax Appeals.

#### I.

Petitioners are individuals residing in the County of Los Angeles, State of California, and are the duly appointed, qualified and acting Executors of the Estate of Will Rogers, deceased. Decedent, a resident of the City of Beverly Hills, California, died testate on August 15, 1935. On September 17, 1935, petitioners were duly appointed executors of the estate of Will Rogers, deceased, by the Superior Court of the State of California, in and for the County of Los Angeles.

#### II.

The notice of deficiency herein was mailed on March 4, 1936. A true copy of said notice of de-



iciency is attached to the petition herein and marked Exhibit A.

### III.

The taxes in controversy are income taxes of Will Rogers, deceased, for the calendar year 1933 in the amount of \$16,894.61.

### IV.

During September, 1927, Will Rogers and his wife, Betty Rogers, purchased from Oren B. Waite certain real property in the County of Los Angeles, State of California, described as follows: Lots 163 and 164, Tract 1719, as per map recorded in Book 21, pages 162 and 163 of Maps in the Office of the County Recorder of Los Angeles County, State of California. The total purchase price of [57] said property was \$105,000.00, payable as follows: \$15,000.00 cash at the time of the purchase, the assumption of a note in the amount of \$52,000.00, which note was secured by a mortgage on said property and became due and payable in 1930, and the giving of a promissory note for the balance of \$38,000.00 to be secured by a trust deed on said property.

In September, 1927, Will Rogers and Betty Rogers paid said \$15,000.00 cash and assumed the payment of said note for \$52,000.00, which was secured by a mortgage on said property. Also in September, 1927, Will Rogers and Betty Rogers made, executed and delivered to the seller, Oren B. Waite, their promissory note in the amount of \$38,000.00, which note was made payable to Oren B.

Waite, or his order, was dated August 19, 1927, provided for the payment of interest at the rate of seven per cent per annum and was payable on or before August 19, 1932.

The above described property which was purchased by Will Rogers and Betty Rogers, as aforesaid, was conveyed to Will Rogers and Betty Rogers subject to said mortgage for \$52,000.00 and immediately thereafter Will Rogers and Betty Rogers conveyed the said property to the Title Guarantee and Trust Company, a corporation, as Trustee, to be held in trust as security for the payment of said promissory note in the amount of \$38,000.00 given by Will Rogers and Betty Rogers to said Oren B. Waite. A true copy of said deed of trust is attached hereto, marked Exhibit A, and hereby made a part hereof.

#### V.

Said property was acquired by Will Rogers and his wife, Betty Rogers, as community property. Said property was business property and the acquisition thereof by Will Rogers and his wife, [58] Betty Rogers, was a transaction entered into for profit.

#### VI.

Prior to 1933 Will Rogers and Betty Rogers paid in full said note in the amount of \$52,000.00 which had been assumed by Will Rogers and Betty

ogers at the time of the purchase of said property.

## VII.

Prior to 1933 said note of Will Rogers and Betty Rogers, in the amount of \$38,000.00, payable to Wren B. Waite, and the beneficial interest under the deed of trust which secured said note, were duly transferred and assigned to the California Trust Company, a corporation.

On August 19, 1932, said note in the amount of \$38,000.00 became due and payable. Said note was not paid on the due date but was surrendered and cancelled in the manner described below. On August 5, 1932 payment of said note in the amount of \$38,000.00 and accrued interest thereon was demanded of Will Rogers and Betty Rogers, and notice was given that unless said principal and interest were paid, the holder of said note would proceed to enforce its rights under the provisions of the deed of trust given to secure payment of said indebtedness.

Thereafter it was agreed by and between Will Rogers and Betty Rogers and the holder of said \$38,000.00 note and the trust deed securing said note that said property be conveyed by Will Rogers and Betty Rogers to the holder of said note and that said note be cancelled and surrendered.

Thereafter said property was re-conveyed by Title Guarantee and Trust Company, the trustee

in the said deed of trust attached hereto as Exhibit A, to Will Rogers and Betty Rogers [59] and on April 21, 1933 Will Rogers and Betty Rogers transferred and conveyed said property to the California Trust Company, a corporation, and said note in the amount of \$38,000.00 was surrendered to Will Rogers and Betty Rogers and cancelled. A true copy of said deed of Will Rogers and Betty Rogers to the California Trust Company is attached hereto, marked Exhibit B, and hereby made a part hereof.

### VIII.

Prior to April 21, 1933 Will Rogers and Betty Rogers paid \$67,000.00 toward the purchase price of said property and, in addition thereto, paid escrow expenses in the amount of \$212.02, or a total of \$67,212.02.

For the years 1927 to 1932 inclusive Will Rogers and Betty Rogers claimed and were allowed depreciation on the improvements on said property in the total amount of \$13,156.77. The total unrecovered cash investment in said property of Will Rogers and Betty Rogers at the time of the conveyance of said property to the California Trust Company on April 21, 1933, as aforesaid, was \$54,055.25. Will Rogers and Betty Rogers each sustained a loss in the year 1933 from said transaction in the amount of \$27,027.62.

### IX.

Will Rogers and his wife, Betty Rogers, filed separate income tax returns for the year 1933. Will

Rogers duly filed his income tax return for the year 1933 with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California. In his said income tax return for the year 1933 [60] Will Rogers computed a loss on said transaction in the amount of \$57,643.46 and deducted one-half of said sum, or, to-wit, \$28,821.73, as an ordinary loss under the provisions of Section 3(e) of the Revenue Act of 1932, in computing his net taxable income for said year. Respondent reduced the amount of said loss to \$54,055.25 and further determined that said loss was a capital loss within the meaning of Section 101 of the Revenue Act of 1932 and treated said loss as a capital loss in computing the tax liability of Will Rogers for the year 1933. The deficiency herein in controversy results from respondent's determination that said loss was a capital loss.

Respectfully submitted,

CLAUDE I. PARKER

JOHN B. MILLIKEN

BAYLEY KOHLMEIER

Counsel for Petitioner.

J. P. WENCHEL

Counsel for Respondent.

## EXHIBIT A.

## DEED OF TRUST.

This Deed of Trust, made this 19th day of August 1927 between Will Rogers and Betty Rogers, his wife, herein called Trustor,

Title Guarantee and Trust Company  
a Corporation, of Los Angeles, California, herein called Trustee, and

Oren B. Waite

herein called Beneficiary, [61]

Witnesseth: That Trustor hereby Grants to Trustee, in Trust, With Power of Sale, all the property in the County of Los Angeles, State of California, described as:

Lots One Hundred Sixty-three (163) and One Hundred Sixty-four (164) of Tract Number Seventeen Hundred Nineteen, in the County of Los Angeles, State of California, as per map recorded in Book 21 pages 162 and 163 of Maps in the office of the County Recorder of said County.

Subject to a mortgage of \$52,000.00 of date August 19, 1927.

For the Purpose of Securing:

First. Payment of the indebtedness evidenced by one promissory note (and any renewal or extension thereof) substantially in form as follows:

\$38,000.00 Los Angeles, California, August 19, 1927.  
On or before five (5) years after date, for value received, We promise to pay to Oren B. Waite, or order, at Los Angeles, California, the sum of Thirty-eight thousand 00/100 Dollars, with interest from date until paid, at the rate of seven per cent per annum, payable semi-annually.

Should interest not be so paid it shall become part of the principal and thereafter bear like interest. Should default be made in payment of interest when due, the whole sum of principal and interest shall, at the option of the holder of this note, become immediately due. Principal and interest payable in United States gold coin. This note is secured by a Deed of Trust to Title Guarantee and Trust Company, a corporation, of Los Angeles, California.

(Signed) WILL ROGERS

(Signed) BETTY ROGERS

This note and deed of trust are given for part purchase price of the premises mentioned.

Second. Payment and/or performance of every obligation, covenant, promise or agreement herein contained.

To have and to hold said property upon the following express trusts, to-wit:

A. Trustor promises and agrees, during continuance of these Trusts:

1. For the purpose of protecting and preserving the security of this Deed of Trust: (a) to properly care for and keep said property in good condition

and repair; (b) not to remove or demolish any building thereon; (c) to complete in a good and workmanlike manner any building which may be constructed thereon, and to pay when due all claims for labor performed and materials furnished therefor; (d) to comply with all laws, ordinances and regulations requiring any alterations or improvements to be made thereon; (e) not to commit or permit any waste or deterioration thereof; (f) not to commit, suffer or permit any act to be done in or upon said property in violation of any law or ordinance; (g) to cultivate, irrigate, fertilize, fumigate, prune and/or do any other act or acts, all in a timely and proper manner, which, from the character or use of said property, may be reasonably necessary to protect and [62] preserve said security the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to beneficiary. The amount collected under any fire insurance policy shall be credited first, to accrued interest; next, to expenditures hereunder and any remainder upon the principal, and interest shall thereupon cease upon the amount so credited upon principal; provided, however, that at option of Beneficiary, the entire amount so collected or any part thereof may be released to Trustor, without liability upon Trustee for such release.

3. To appear in and defend any action or proceeding purporting to affect the security of this



Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary and/or Trustee may appear.

4. To pay before default or delinquency: (a) all taxes, assessments or incumbrances (including any debt secured by Deed of Trust), which appear to be prior liens or charges upon said property or any part thereof, including assessments on appurtenant water stock, and any accrued interest, cost or penalty thereon; (b) all costs, fees and expenses of these Trusts, including cost of evidence of title and Trustee's fees in connection with sale, whether completed or not, which amounts shall become due upon delivery to Trustee of Declaration of Default and Demand for Sale, as hereinafter provided.

5. To pay within thirty days after expenditure, without demand, all sums expended by Trustee or Beneficiary under the terms hereof, with interest from date of expenditure at the rate of ten per cent per annum.

B. Should Trustor fail or refuse to make any payment or to do any act, which he is obligated hereunder to make or do, at the time and in the manner herein provided, then Trustee and/or Beneficiary, each in his sole discretion, may, without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof;

1. Make or do the same in such manner and to such extent as may be deemed necessary to protect the security of this Deed of Trust, either Trustee or Beneficiary being authorized to enter upon and take possession of said property for such purposes.

2. Commence, appear in or defend any action or proceeding affecting or purporting to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder, whether brought by or against Trustor, Trustee or Beneficiary; or

3. Pay, purchase, contest or compromise any prior claim, debt, lien, charge or incumbrance which in the judgment of either may affect or appear to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder.

Provided that neither Trustee nor Beneficiary shall be under any obligation to make any of the payments or do any of the acts above mentioned, but, upon election of either or both so to do, employment of an attorney is authorized and payment of such attorney's fees is hereby secured.

C. Trustee shall be under no obligation to notify any party hereto of any action or proceeding of any kind in which Trustor, Beneficiary and/or Trustee shall be named as defendant, unless brought by Trustee.

D. Acceptance by Beneficiary of any sum in payment of any indebtedness secured hereby, after the date when the same is due, shall not constitute [63] a waiver of the right either to require prompt

payment, when due, of all other sums so secured or to declare default as herein provided for failure so to pay.

E. Trustee may, at any time, or from time to time, without liability therefor and without notice, upon written request of Beneficiary and presentation of this Deed of Trust and the note secured hereby for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby or the effect of this Deed of Trust upon the remainder of said property:

1. Reconvey any part of said property;
2. Consent in writing to the making of any map or plat thereof; or
3. Join in granting any easement thereon.

F. Upon payment of all sums secured hereby and surrender to Trustee, for cancellation, of this Deed of Trust and the note secured hereby, Trustee, upon receipt from Beneficiary of a written request reciting the fact of such payment and surrender, shall reconvey, without warranty, the estate then held by Trustee, and the Grantee in such reconveyance may be described in general terms as "the person or persons legally entitled thereto", and Trustee is authorized to retain this Deed of Trust and such note. The recitals in such reconveyance of any matters or facts shall be conclusive proof against all persons of the truthfulness thereof.

G. 1. Should breach or default be made by Trustor in payment of any indebtedness and/or in the performance of any obligation, covenant, prom-

ise or agreement herein mentioned, then Beneficiary may declare all sums secured hereby immediately due, and in such case, shall execute and deliver to Trustee a written Declaration of Default and Demand for Sale and shall surrender to Trustee this Deed of Trust, the note and receipts or other documents evidencing any expenditure secured hereby. Thereafter there shall be recorded in the office of the recorder of the county or counties wherein said real property or some part thereof is situated, a notice of such breach or default and of election to sell or cause to be sold the herein described property to satisfy the obligations hereof.

2. After three months shall have elapsed following such recordation of said notice, Trustee, without demand on Trustor, shall sell said property as herein provided, having first given notice of the time and place of such sale in the manner and for a time not less than that required by the laws of the State of California for sales of real property under Deeds of Trust.

3. Trustee may postpone sale of all, or any portion, of said property by public announcement at the time fixed by said notice of sale, and may thereafter postpone said sale from time to time by public announcement at the time fixed by the preceding postponement; and without further notice it may make such sale at the time to which the same shall be so postponed; provided, however, that the sale or any postponement thereof must be made at the place fixed by the original notice of sale.

4. At the time of sale so fixed, Trustee may sell the property so advertised, or any part thereof, either as a whole or in separate parcels at its sole discretion, at public auction, to the highest bidder for cash in United States gold coin, all payable at time of sale, and after any such sale and due payment made, shall execute and deliver to such purchaser a deed or deeds conveying the property so sold, but without covenant or warranty, express or implied, regarding title, possession or incumbrances. Trustor hereby agrees to surrender immediately and without demand possession of said property to such purchaser. The recitals in such deed or deeds of any matters or facts affecting the regularity or validity of said sale shall [64] be conclusive proof of the truthfulness thereof and such deed or deeds shall be conclusive against all persons as to all matters or facts therein recited. Trustee, Beneficiary, any person on behalf of either, or any other person, may purchase at such sale.

H. Trustee shall apply the proceeds of any such sale to payment of:

1. (a) Expenses of sale; (b) all costs, fees, charges and expenses of Trustee and of these Trusts, including cost of evidence of title and Trustee's fee in connection with sale;
2. All sums expended under the terms hereof, not then repaid, with accrued interest at the rate of ten per cent per annum;
3. Accrued interest on said note;

4. Unpaid principal of said note; or if more than one, the unpaid principal thereof pro rata and without preference or priority; and

5. The remainder if any to the person or persons legally entitled thereto, upon proof of such right.

I. This Deed of Trust in all its parts applies to, inures to the benefit of, and binds all parties hereto their heirs, legatees, devisees, administrators, executors, successors and assigns.

J. Trustee accepts these Trusts when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law.

In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

Witness the hand of Trustor, the day and year first above written.

(Signed) WILL ROGERS

(Signed) BETTY ROGERS

State of California

County of Los Angeles—ss.

On this 28th day of September, 1927, before me, undersigned, a Notary Public in and for said County, personally appeared Will Rogers and Betty Rogers, husband and wife, known to me to be the persons whose names are subscribed to the within

instrument, and acknowledged that they executed the same.

Witness my hand and official seal.

(Signed) HENRY C. CLARKE, JR.

Notary Public in and for said  
County and State.

Notarial Seal]

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EXHIBIT B.

GRANT DEED.

Will Rogers and Betty Rogers, his wife in consideration of Ten and no/100 Dollars, to them in hand paid, receipt of which is hereby acknowledged, do hereby [65] grant to California Trust Company, a corporation, as Trustee under that certain Trust indenture entered into between Pacific Palisades Association and California Trust Company, dated April 1, 1926, and recorded May 27, 1926, in the office of the County Recorder of Los Angeles County, California, in Book 6031, Page 1 of Official Records, and as modified by a certain Supplemental indenture, the real property in the County of Los Angeles, State of California, described as

Lots One Hundred sixty-three (163) and One Hundred sixty-four (164) of Tract Number Seventeen Hundred Nineteen, in the County of Los Angeles, State of California, as per Map recorded in Book 21 Pages 162 and 163 of Maps, in the office of the County Recorder of said County.

Subject to conditions, restrictions, reservations, easements, and rights of way of record and

Subject to all taxes for the fiscal year 1933 34 and thereafter; and also subject to all improvement district taxes, assessments, and/or bonds, if any, now or hereafter a lien upon or assessed against said realty.

“This deed is an absolute conveyance, the consideration therefor, in addition to that above recited, being full satisfaction of all obligations secured by the deed of trust executed by Will Rogers and Betty Rogers, to Title Guarantee and Trust Company, trustee, for Oren B. Waite, beneficiary, recorded in Book 7661 Page 389 of Official Records of Los Angeles County.”

“Grantors acknowledge that this conveyance is freely and fairly made; that the consideration received by grantors is equal to the fair value of grantors interest in said land, and that there are no agreements, oral or written, other than this deed between grantors and grantee with respect to said land.”

To have and to hold to said Grantee, its successors or assigns.

Witness our hands this 14th day of April, 1933.

WILL ROGERS

BETTY ROGERS



(Reverse side)

State of California

County of Los Angeles—ss.

On this 14th day of April, 1933, before me Pearl M. Stout, a Notary Public in and for said Los Angeles County, personally appeared Will Rogers [66] and Betty Rogers, his wife, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged that they executed the same.

Witness my hand and official seal.

PEARL M. STOUT

Notary Public in and for said County and State.

My Commission expires Feb. 16, 1934.

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[Title of Board and Cause—Docket No. 84895.]

STIPULATION OF FACTS.

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel of record, that the following are true and material facts involved in this cause and may be found as facts by the Board of Tax Appeals.

I.

Petitioner is an individual residing in the City of Beverly Hills, State of California.

## II.

The taxes in controversy are income taxes of petitioner for the calendar year 1933 in the amount of \$17,055.90.

## III.

Paragraphs III to VII inclusive are omitted for the reason that they are substantially identical with Paragraphs IV to VIII inclusive of the preceding Stipulation of Facts. [67]

## VIII.

Petitioner and her husband, Will Rogers, filed separate income tax returns for the year 1933. Petitioner duly filed her income tax return for the year 1933 with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California. In her said income tax return for the year 1933, petitioner computed a loss on said transaction in the amount of \$57,643.46 and deducted one-half of said sum, or, to-wit, \$28,821.73, as an ordinary loss under the provisions of Section 23(e) of the Revenue Act of 1932, in computing her net taxable income for said year. Respondent reduced the amount of said loss to \$54,055.25 and further determined that said loss was a capital loss within the meaning of Section 101 of the Revenue Act of 1932 and treated said loss as a capital loss in recomputing the tax liability of petitioner for the year 1933. The deficiency herein in controversy results from

respondent's determination that said loss was a capital loss.

Respectfully submitted,

CLAUDE I. PARKER

JOHN B. MILLIKEN

BAYLEY KOHLMEIER

Counsel for Petitioner

J. P. WENCHEL

Counsel for Respondent. [68]

The foregoing Stipulations of Fact were all of the evidence introduced on behalf of the respective petitioners in these cases. Respondent introduced no evidence. Thereupon counsel for petitioners and counsel for respondent stated that they had no further evidence to present and submitted the cases to the Member of the United States Board of Tax Appeals hearing the proceeding. Petitioners Betty Rogers and Betty Rogers, O. N. Beasley, Oscar Lawler and James K. Blake, executors of the estate of Will Rogers, deceased, tender and present the foregoing as their statement of evidence in this case as consolidated by order of the United States Circuit Court of Appeals and pray that the same may be approved by the United States Board of Tax Appeals and made a part of the record in this cause.

Respectfully submitted,

CLAUDE I. PARKER

JOHN B. MILLIKEN

BAYLEY KOHLMEIER

HARRIET GEARY

Attorneys for Petitioners [69]

[Title of Board and Cause—Docket Nos. 84895 and 84896.]

### STIPULATION.

It is hereby stipulated by and between the parties to the above entitled cases through their respective counsel that the foregoing statement of evidence constitutes a statement of all the material evidence adduced at the hearing before the United States Board of Tax Appeals in said above entitled cases, and the same is approved by the undersigned as attorneys for the petitioners on review and by the undersigned, J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue, respondent on review. [70]

Dated this 29th day of September, 1938.

CLAUDE I. PARKER

JOHN B. MILLIKEN

BAYLEY KOHLMEIER

HARRIET GEARY

Counsel for Petitioners.

J. P. WENCHEL

Counsel for Respondent. [71]

[Title of Board and Cause—Docket Nos. 84895 and 84896.]

### ORDER APPROVING STATEMENT OF EVIDENCE.

The foregoing Statement of Evidence constitutes all of the material evidence adduced at hearing of

the above entitled cases and in order that the same may be preserved and made a part of the record in said cases which have been ordered consolidated by the order of the Circuit Court of Appeals, this Statement of Evidence is duly approved and settled this 30th day of Sept., 1938.

(S) ARTHUR J. MELLOTT

Member of the United States  
Board of Tax Appeals.

[Endorsed]: U. S. B. T. A. Lodged Sept. 29, 1938.  
Filed Sept. 30, 1938. [72]

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[Title of Board and Cause—Docket Nos. 84895 and  
84896.]

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the United States Board of Tax  
Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies, duly certified as correct, of the following documents and records in the above entitled causes in connection with the petitions for review by the said Circuit Court of Appeals for the Ninth Circuit heretofore filed by the above named petitioners.

1. Docket entries of all proceedings before the Board of Tax Appeals in Docket No. 84895.

2. Docket entries of all proceedings before the Board of Tax Appeals in Docket No. 84896.

[73]

3. Petition for redetermination in Docket No. 84895 filed on May 29, 1936.

4. Petition for redetermination in Docket No. 84896 filed on May 29, 1936.

5. Answer to petition filed on June 30, 1936, in Docket No. 84895.

6. Answer to petition filed on June 30, 1936, in Docket No. 84896.

7. Opinion of the Board of Tax Appeals promulgated on May 18, 1938.

8. Decision of the Board of Tax Appeals in Docket No. 84895.

9. Decision of the Board of Tax Appeals in Docket No. 84896.

10. Petition for Review in Docket No. 84895 filed on August 13, 1938.

11. Petition for Review in Docket No. 84896 filed on August 13, 1938.

12. Notice for filing petition for review filed on August 13, 1938 in Docket No. 84895.

13. Notice for filing petition for review filed on August 13, 1938 in Docket No. 84896.

14. Stipulation for Consolidation for Review and Order for Consolidation for Review.

15. Statement of Evidence approved and filed on....., 1938.

16. This Praecipe for record. [74]

Said transcript to be prepared as required by law and the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

CLAUDE I. PARKER  
JOHN B. MILLIKEN  
BAYLEY KOHLMEIER  
HARRIET GEARY

Attorneys for Petitioner.

Service of a copy of this Praecipe is hereby admitted this 29th day of September, 1938. Agreed to.

J. P. WENCHEL

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed Sept. 29, 1938.

[75]

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[Title of Board and Cause—Docket Nos. 84895 and 84896.]

ORDER.

Upon consideration of the motion of the above-named petitioners on review, and it appearing to the Court that counsel for the respondent on review has consented to the granting thereof, it is, by the Court, this 15th day of September, 1938, ordered

1. That the motion is granted as made, and that the causes appearing in the caption hereof are hereby directed to be consolidated herein for briefing, hearing, argument, and decision upon a single

consolidated transcript of record, consisting of such portions of the record made before the United States Board of Tax Appeals as the parties herein may indicate by their praecipes for record.

And the Clerk of this Court is directed to transmit a certified copy of this order to the Clerk of the United States Board of Tax Appeals, to be by him incorporated in the record on review as certified and transmitted by him to this Court.

CURTIS D. WILBUR

U. S. Circuit Judge.

[Endorsed]: Filed September 19, 1938.

A true copy. Attest: Sept. 19, 1938.

[Seal]

PAUL P. O'BRIEN,

Clerk.

By FRANK H. SCHMIDT,

Deputy Clerk.

[Endorsed]: U. S. B. T. A. Filed Sept. 24, 1938.

PAUL P. O'BRIEN,

Clerk. [76]

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[Title of Board and Cause—Docket Nos. 84895 and 84896.]

CERTIFICATE.

I. B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 76, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on



file and of record in my office as called for by the Praeceptum in the appeals as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 5th day of October, 1938.

[Seal]

B. D. GAMBLE

Clerk, United States Board of  
Tax Appeals.

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[Endorsed]: No. 9007. United States Circuit Court of Appeals for the Ninth Circuit. Betty Rogers, Petitioner, vs. Commissioner of Internal Revenue, Respondent, and Betty Rogers, O. N. Beasley, Oscar Lawler, James K. Blake, Executors of the Estate of Will Rogers, Deceased, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record Upon Petitions to Review Decisions of the United States Board of Tax Appeals.

<sup>6</sup> Filed October 10, 1938.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

